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NO. 86-6139

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IN THE
SUPREME COURT OF THE UNITED STATES

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CLARA WATSON,

Petitioner,

V.

FORT WORTH BANK AND TRUST,

Respondents.

* * * * * * * * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * * * * * * * *

BRIEF OF AMICI CURIAE STATE OF TEXAS AND TEXAS COMMISSION ON HUMAN RIGHTS; THE STATE OF ALABAMA; THE STATE OF HAWAII; THE COMMONWEALTH OF MASSACHUSETTS AND MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION; THE STATE OF NEW JERSEY; THE STATE OF OHIO AND OHIO CIVIL RIGHTS COMMISSION; THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS; THE STATE OF VERMONT; THE STATE OF WYOMING AND WYOMING DEPARTMENT OF LABOR, FAIR EMPLOYMENT DIVISION: IN SUPPORT OF PETITIONERS.

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INTEREST OF THE AMICI CURIAE

The Texas Commission on Human Rights was established to enforce the Texas Commission on Human Rights Act,[1] which prohibits various forms of employment discrimination. This Texas statute is modeled after and very closely tracks the language of Title VII of the 1964 Civil Rights Act.[2] Indeed, the express purpose of the Texas Act is "to provide for the execution of the policies embodied in Title VII," including the objective of "secur[ing] for persons within the state freedom from discrimination in certain transactions concerning employment." *Id.* at §1.02. To fulfill this purpose, the Texas Commission on Human Rights is given enforcement powers comparable to those of the Equal Employment Opportunity Commission under Title VII. Given the close parallels in language and purpose between the Texas Commission on Human Rights Act and Title VII, it may be expected that Texas courts interpreting the state law are likely to be guided by this Court's construction of Title VII. Consequently, *amicus curiae* Texas Commission on Human Rights has a significant interest in this Court's decision in the instant case. For the reasons set out in this brief, the Commission is convinced that the application of disparate impact analysis to subjective employment criteria is essential for the eradication of illegal discrimination in the workplace.

In deciding to submit this *amicus* brief on behalf of the Texas Commission on Human Rights *et*

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[1] Vernon's Ann. Civ. Stat. Art. 5221k (1987).

[2] 42 U.S.C. §2000e et seq. (1982).

al., the Attorney General of Texas has also weighed the interests of the State of Texas as a major employer. The Attorney General of Texas is responsible for defending state agencies sued under Title VII. It is the view of *amici* herein that the marginal disadvantage to employers, if any, of easing the plaintiff's burden in cases alleging discrimination through subjective employment practices, does not outweigh the State's interest in the effective enforcement of anti-discrimination laws. As explained in part IV of this brief, the position advocated herein does not impose an onerous burden on employers.

It is time to recognize that state government throughout the nation has made impressive progress in eliminating discrimination from its own employment practices. While much remains to be done before full equality of opportunity is achieved, state government need not fear close scrutiny of its hiring practices[3] and vigorous enforcement of anti-discrimination laws.

The State of Texas is joined in this brief by: The State of Alabama (by and through the Honorable Don Siegelman, Attorney General); the State of Hawaii (by and through the Honorable Warren Price, III, Attorney General); the Commonwealth of Massachusetts and Massachusetts Commission Against Discrimination (by and through the Honorable James M. Shannon, Attorney General); the State of New Jersey (by and through

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[3] For example, while according to data compiled by the State Bar of Texas only 18% of lawyers licensed in Texas are female, 3.7% are Hispanic, and 1.6% are black, 39% of the approximately 260 attorneys employed by the Attorney General of Texas are female, 14% are Hispanic, and 9% are black.

the Honorable W. Cary Edwards, Attorney General); the State of Ohio and Ohio Civil Rights Commission (by and through the Honorable Anthony J. Celebreeze, Jr., Attorney General); the State of Rhode Island and Providence Plantations (by and through the Honorable James E. O'Neil, Attorney General); the State of Vermont (by and through the Honorable Jeff Amestoy, Attorney General); the State of Wyoming and Wyoming Department of Labor, Fair Employment Division (by and through the Honorable Joseph B. Meyer, Attorney General, and Mike Sullivan, Commissioner of Labor).

For each *amicus* state, as with the State of Texas, its Attorney General has balanced the interest of the state as employer and the state as protector of its citizens' right to be free from employment discrimination, and in each case has struck that balance in favor of the position argued herein. The *Amici Curiae* take no position on the merits of the present case but regard as crucial the ability of a plaintiff to try her case and have her proofs judged under the proper legal theories.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case as set forth by the Petitioner in the instant case.

SUMMARY OF ARGUMENT

Disparate impact analysis has been a vital tool in the eradication of employment discrimination since the Court established its use in 1971. In *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971), this Court recognized that an essential function of Title

VII[4] was to remove *all* barriers which denied women and minorities equal employment opportunities. To this end, the Court interpreted Title VII as proscribing not only intentional discrimination, but also employment practices that have discriminatory *effects*, regardless of an employer's intent in implementing them. *Id.*, at 431.

The application of disparate impact analysis in *Griggs* was not only an explicit recognition that discrimination could take many forms but further, it was an assertion that Title VII should attack employment discrimination in both its overt and more subtle forms. To realize the full extent to which Title VII can be used as a tool to root out discrimination requires a review of the historical treatment of Title VII case law. Although the early years of Title VII were characterized by cases involving overt, intentional discrimination, the later years have seen an increase in cases of more subtle and thus less identifiable discrimination. Disparate impact analysis, therefore, has been used not only to attack neutral policies that effectively but inadvertently discriminate against protected groups, but also to challenge those neutral policies which are in fact a pretext for intentional discrimination.

The use of subjective employment practices creates at least as much risk of inadvertent discriminatory effects as the use of objective practices. Moreover, subjective criteria offer an even more convenient pretext for intentional discrimination than their objective counterparts. The use of subjective criteria in hiring and promotion of employees, although not discriminatory *per se*, is nevertheless viewed suspiciously by most

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[4] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

courts. Reliance on subjective criteria leaves ample room for the operation of bias and prejudice, and should be examined closely by courts and used sparingly by employers. Disparate impact analysis under Title VII is an extremely valuable and necessary analytical tool for courts. It enables them to carefully scrutinize the use of subjective employment criteria once a plaintiff has demonstrated that such use has a disparate impact on a particular group. It would be a grave mistake, then, in light of Title VII's purpose of ending discrimination, to completely disallow the application of disparate impact analysis where it is needed most: to challenge inherently suspect subjective employment criteria.

Some would argue that it is unwise to subject an employer's subjective practices to the heightened scrutiny of disparate impact analysis. An employer may, however, assert the affirmative defense of business necessity when his or her practices are challenged as having a disparate effect. Although a showing of business necessity is a heavier burden than that which is borne by a defendant in a disparate treatment case,[5] it is not onerous. First, it is important to note that an employer is only required to make such a showing once a plaintiff has met his or her burden of equal weight: to demonstrate that the employer's practice has a disparate impact. Thus the employer's burden is not excessive when compared with that of the

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[5] A defendant employer in a disparate treatment case must merely articulate a legitimate, nondiscriminatory reason for taking a particular personnel action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

plaintiff-employee. Second, once a plaintiff demonstrates that an employer's subjective practices have a discriminatory effect on a particular group, both public policy and the spirit of Title VII favor asking the employer to explain and justify his or her procedures. Finally, a showing of business necessity to justify subjective employment practices does not involve the painstaking use of scientific validation techniques, as are frequently used in cases involving objective criteria. An employer need only demonstrate that the use of subjective criteria is necessary to his or her business. Such a showing is not onerous and is mandated by the clear purpose of Title VII: the abolition of *all* impermissible discrimination in employment.

ARGUMENT

I. INTRODUCTION

Title VII of the 1964 Civil Rights Act prohibits discrimination in employment based on race, color, religion, sex or national origin. 42 U.S.C. §2000e-2(a) (1982). An employee may prove employment discrimination under a theory of disparate treatment or one of disparate impact. In a disparate treatment case, a plaintiff alleges that she was treated less favorably by her employer based on her race, color, religion, sex, or national origin. The plaintiff must show that her employer *intended* to discriminate against her. *International Board of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1979). A discriminatory motive may be inferred, however, when a plaintiff shows she is a member of a protected class who was qualified and applied for a position for which the employer was seeking applicants, and failed to get that position, which remained open after her rejection. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973);

Texas Dept. of Community Affairs v. *Burdine*, 450 U.S. 248 (1981). The employer must then articulate a legitimate non-discriminatory reason for rejecting the plaintiff. Finally, the plaintiff may show that the employer's reason is in fact a pretext for intentional discrimination. *Id.*

In a disparate impact case, the elements are somewhat different. First, a plaintiff must show that one or more facially neutral employment practices have a disparate impact on a group of which she is a member. Proof of discriminatory intent on the part of the employer is not required. *Teamsters*, *supra*, at 335 n.15. After a plaintiff has made such a showing, the employer must justify the employment practices by showing that they are a "business necessity." *Griggs* v. *Duke Power Co.*, *supra*, at 431. Finally, a plaintiff may show that the employer's use of the employment practices was in fact a pretext for intentional discrimination. One way in which she may make such a showing is to demonstrate that there are satisfactory alternations which are less discriminatory. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

There are thus two major differences between the theories which render the disparate impact analysis a stronger weapon against discrimination. First, under the disparate impact theory, a plaintiff does not have to prove intent as part of her prima facie case. Second, after a plaintiff has demonstrated an adverse impact, the employer has to do more than merely *articulate* a legitimate, nondiscriminatory reason for the disparity. Rather, the employer must *prove* business necessity for the use of the employment practice which causes the disparate impact. These two differences make the disparate impact analysis a stronger tool with which courts may closely examine an employer's practices, once they have been shown to have had a discriminatory impact.

II. THE PURPOSE OF TITLE VII SUPPORTS THE APPLICATION OF DISPARATE IMPACT ANALYSIS TO SUBJECTIVE EMPLOYMENT CRITERIA.

A. The statutory language of Title VII supports the application of disparate impact analysis to subjective employment criteria.

Section 703 (a)(2) of Title VII[6] provides that: It shall be an unlawful employment practice for an employer - ...

> (2) to limit, segregate, or classify his employees or applicants for employment *in any way* which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of race, color, religion, sex or national origin.

Title VII thus prohibits all forms of employment discrimination regardless of their subjective or objective nature. Both subjective and objective criteria can work to exclude a person that but for that criteria would be qualified to perform the job. There is nothing in the language of Section 703(a)(2) which draws a distinction between objective and subjective employment criteria; nor is there any language to suggest that discriminatory effects of subjective criteria should go unchecked. On the contrary, the language of Section 703(a)(2) indicates that Title VII is to be read broadly, covering a wide range of actions by an employer if such action has the effect of depriving an

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[6] 42 U.S.C. §2000e-2(1)(2) (1982), (emphasis added).

individual of employment opportunities or adversely affects his or her status as an employee.

The emphasis thus is on the effects of discrimination rather than on the causes of it. Discrimination clearly can be the *effect* of many subjective employment practices, regardless of an employer's intent in instituting them. It is evident from the expansive language of Title VII that subjective employment procedures, if they have discriminatory effects, constitute an unlawful employment practice. Disparate impact analysis should therefore be applicable in cases in which plaintiffs can demonstrate that his or her subjective criteria has a discriminatory effect on a group to which he or she belongs.

B. The purpose of Title VII as interpreted by this Court supports the application of disparate impact to subjective employment criteria.

In *Griggs v. Duke Power Co., supra*, this Court held that Congress had indeed directed the thrust of Title VII "to the *consequences* of employment practices, not simply the motivation."[7] The Court's holding as to the scope of Title VII in *Griggs* indicates a sensitive interpretation of the statute and an understanding of the problem it was intended to address.[8]

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[7] 401 U.S. 424, 432 (1971) (emphasis in the original).

[8] Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH.L.REV. 59, 63 (1972).

> The assumption underlying *Griggs* is that the Civil Rights Act of 1964 protects the interests of minority groups and their members in securing and improving employment opportunities. *Griggs* views discrimination not only as an isolated act by an aberrant individual wrongdoer that affects only an individual complainant, but also as the operation of industrial-relations systems that adversely affect group minority members.[9]

In *Griggs*, this Court validated the disparate impact analysis as a proper theory under which plaintiffs could challenge employment practices which have discriminatory effects.

Although *Griggs* dealt specifically with objective criteria[10] the opinion does not expressly limit disparate impact analysis to such criteria. It is important to note that throughout the *Griggs* opinion, the Court makes references to employment "practices" and "procedures"[11] and does not limit its discussion to objective criteria such as tests. The *Griggs* holding thus applies to all employment practices and procedures, not simply to isolated objective components.

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[9] *Id.*, at 62.

[10] *Griggs* involved the use of a facially neutral test.

[11] "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. 424, 430 (1971).

This Court has never expressly limited disparate impact to objective criteria. The opinion in *Connecticut v. Teal*, 457 U.S. 440 (1982), in which the Court rejected the "bottom line" defense in disparate impact cases, did not distinguish between subjective and objective practices in terms of the applicability of disparate impact analysis.[12] Nor did the court expressly limit disparate impact analysis to objective criteria in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). Although the Court did not apply the disparate impact analysis to subjective employment practices, it did not explicitly hold that disparate impact analysis would be inapplicable in such cases. Moreover, the plaintiffs in *Furnco* failed to make a showing of disparate impact, thus making use of the disparate impact analysis inappropriate in that case.[13]

C. The Congressional intent behind Title VII supports the application of disparate impact analysis to subjective employment criteria.

Three legislative goals of Title VII are evident from its legislative, social and political history.[14] As first proposed, the statute would have eliminated

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[12] 457 U.S. 440, 447 n.8.

[13] 438 U.S. 567, 571.

[14] Friedman, *Redefining Equality, Discrimination, and Affirmative Action Under Title VII: The Access Principle*, 65 TEX.L.REV. 41, 60 (1986).

race, color, religion and national origin as factors in employment decisions.[15] The House also added sex to the list of prohibited bases for employment discrimination.[16] Eliminating *intentional* discrimination was the first and most important goal of Congress in 1964. In fact, some members of the Senate were adamant that Title VII be limited to intentional discrimination and forced the addition of amendments which so limited the reach of the statute.[17] Senator Humphrey (D-Minn.), one of the main proponents of Title VII, felt that the addition of the amendments was unnecessary as the statute implicitly required intent.

> Since the title bars only discrimination because of race, color, religion, sex or natural [sic] origin it would seem already to require intent, and, thus, the proposed change does not involve any substantive change ... The express requirement of intent is designed to make it wholly clear that inadvertent or accidental discriminations will not violate the title...[18]

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[15] H.R. Rep. No. 914, 88th Cong., 2d. Sess. 2, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2401.

[16] 110 CONG. REC. 2577-84, 2718, 2720-21 (1964).

[17] "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in unlawful employment practice charged in the complaint, the court may enjoin respondent..." 42 U.S.C. §2000e-5(g) (1982).

[18] 110 CONG. REC. 12,723-24 (1964).

With that goal in mind, Congress passed Title VII of the 1964 Civil Rights Act.

A review of the legislative history behind the 1972 amendments to Title VII reveals a second goal. By 1971, Congress began considering amendments to Title VII. Many Congressmen had increased their understanding about employment discrimination, its victims, and how to eradicate it.[19] Thus was clarified a second goal of Title VII: the eradication of the discriminatory effects of employment practices regardless of employers' intent.

> During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment practices tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization...
>
> Employment discrimination, as we know it today, is a more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs...[20]

Congress saw the need for and approved the use of the disparate impact theory.

> A recent striking example was provided by the Supreme Court in *Griggs*...where the Court held that use of employment

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[19] Note, *Applying Disparate Impact Theory to Subjective Employee Selection Procedures*, 20 LOYOLA OF LOS ANGELES LAW REVIEW 323, 386 (1987).

[20] H.R. Rep. No. 238, 92d Cong., *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS at 2144.

> tests, even when nondiscriminatory and applied in good faith by the employer, was a violation of Title VII if such tests work a discriminatory effect in hiring patterns ... *Id.*

The Senate Committee in fact endorsed the use of the disparate impact theory by the Civil Service Commission to reexamine its entire rehiring and promotion procedures.[21]

The final goal of Title VII was to minimize government interference with "traditional management prerogatives."[22] This final goal of trying to preserve employer autonomy may not always be consistent with the other two statutory goals.[23] To preserve employer autonomy completely

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[21]"It is in these and other areas where discrimination is institutional, rather than merely a matter of bad faith, that corrective measures appear to be urgently required. For example, the Committee expects the Civil Service Commission to undertake a thorough reexamination of its *entire* testing and a *qualification* program to ensure that the standards enunciated in the *Griggs* case are fully met." S. Rep. No. 415, 92d, Cong., 1st Sess. (1971) (emphasis added).

[22]Friedman, *supra* at 61. *See Local 93, International Assoc. of Firefighters v. City of Cleveland*, _____ U.S. _____; 106 S.Ct. 3063, 3075 (1986).

[23]"Not unexpectedly, the implementation of Title VII has uncovered profound tensions by attempting simultaneously to wipe out discrimination while minimally disrupting private decision making."

(Footnote Continued)

would be to allow employers absolute discretion in their employment practices, to hire, terminate and promote at will, based on race, sex, performance or any other standard. Exercise of such discretion is not tolerated when it operates to discriminate against women or minorities. As a matter of public policy some practices must be prohibited regardless of whether the prohibition interferes with "traditional management prerogatives." For example, compare the proscription of discrimination in public accommodation. Title II of the Civil Rights of 1964, 42 U.S.C. §2000a (1982); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 257, 259-261 (1964). By definition, a prohibition against employment discrimination such as Title VII must interfere with "traditional management prerogatives" to the extent that those prerogatives discriminate. To be sure, the freedom of employers to freely conduct their businesses must be preserved. Their freedom ends, however, and must be enjoined, when it infringes on an employee's right to be free from discrimination based on her race, color, religion, sex or national origin. The overriding purpose of Title VII is to end discrimination. "It is abundantly clear that Title VII tolerates no discrimination, subtle or otherwise." *McDonnell Douglas v. Green, supra*, at 801.

Although judicial examination of employers' subjective practices interferes somewhat with their "traditional management prerogatives," it does so only to the extent that those prerogatives inadvertently or intentionally are used to

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(Footnote Continued)
Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 U.C.L.A. L.REV. 305, 306 (1983).

discriminate. Judicial interference takes place only after there has been a prima facie showing that an employer's practices have had a discriminatory effect on a particular group.[24] At that point, such an intrusion is warranted and even mandated by the purpose of Title VII. It is essential to the fulfillment of the explicit goal of Congress in enacting Title VII that courts be allowed to use the most effective tools to attack employment discrimination. Disparate impact is such a tool, and should be used in the examination of subjective criteria if they adversely impact the employment of women and minorities.

D. The agencies charged with enforcement of Title VII apply disparate impact analysis to subjective employment criteria.

In 1978, Title VII's four enforcement agencies[25] jointly issued the *Uniform Guidelines on Employee Selection Procedures*. 29 C.F.R. §1607.1.A (1985). The 1978 *Guidelines* strengthened the agencies' regulations with respect to disparate impact analysis by stating that any "procedure having adverse impact constitutes discrimination unless justified." 29 C.F.R. §1607.3.A. (1985).

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[24] *Albemarle, supra*, at 425 (saying that an employer's burden to prove business necessity to the court's satisfaction only arises after a plaintiff makes a prima facie showing that the employment practices have a disparate impact).

[25] The Equal Employment Opportunity Commission (EEOC), the Department of Justice, the Department of Labor, and the Civil Service Commission.

They also defined the employment procedures to which adverse impact analysis was applicable as including subjective criteria.

> Selection procedures includes the full range of assessment techniques, from traditional paper and pencil tests ... through *informal or casual interviews and unscored application forms*. 29 C.F.R. §1607.16.Q (1985) (emphasis added).

Through these *Guidelines*, the EEOC and other enforcement agencies have announced their view that the law requires application of the disparate impact model to all selection procedures, objective or subjective. *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1483 (9th Cir. 1987).

Such agency regulations are entitled to "great deference," and can be treated as "expressing the will of Congress." *Griggs, supra* at 434.[26] Enforcement agencies such as the EEOC are no doubt intimately familiar with the workings of the statute, and have a uniquely accurate view of where discrimination may be found. Their views of the law reflect their experience in the real world of employment discrimination and should be accorded great weight by courts. In this case, the EEOC has obviously found that discrimination can result from *all* employment procedures, and applies disparate impact to both objective and subjective criteria. Its conclusion springs from years of processing thousands of discrimination claims and should be accorded "great deference" by this Court.

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[26] *See also Albemarle Paper Co. v. Moody, supra*, at 431; *Atonio v. Wards Cove Packing Co., Inc., supra*, at 1483; *Griffin v. Carlin, supra*, at 1525.

E. To hold that disparate impact analysis is not applicable to subjective employment criteria would frustrate the purpose of Title VII.

One of the consequences of prohibiting the use of adverse impact analysis to challenge subjective employment practices would undoubtedly be to encourage the use of such practices.

> Exclusion of such subjective practices from the reach of the disparate impact model of analysis is likely to encourage employers to use subjective, rather than objective, selection criteria. Rather than validate education and other objective criteria, employers could simply take such criteria into account in subjective interviews or review panel decisions. It could not have been the intent of Congress to provide employers with an incentive to use such devices rather than validated objective criteria.

Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985). An employer could effectively immunize himself from the more exacting scrutiny of a disparate impact challenge merely by adopting subjective employment practices. "If an employer cannot be challenged for an employment policy which is a subjective mix of a variety of factors, that is the type of system the employer will create."[27] Congress could not have intended to encourage the use of employment criteria that are

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[27] Note, *Application of the Adverst Impact Analysis to Subjective Criteria in Title VII Employment Discrimination Cases*, 38 BAYLOR LAW REVIEW, 363, 381 (1986).

inherently suspect, and that can easily be used to mask intentional discrimination. Encouraging the use of subjective criteria by limiting the reach of disparate impact analysis would subvert the clear intent of Congress in enacting Title VII.

One of the purposes of enacting Title VII was to encourage employers to take it upon themselves to evaluate their own employment practices. Title VII:

> provides the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.

Albemarle, supra, at 417-418. This purpose of Title VII would clearly be undermined if this Court were to hold that disparate impact analysis was not applicable to subjective criteria. Instead of encouraging employers to examine their practices in order to eliminate the vestiges of discrimination, it would allow employers to practice discrimination under the guise of subjective employment practices. A policy which is further away from Congress' intent in enacting Title VII can hardly be imagined.

Finally, Congress intended Title VII, especially the 1972 amendments, to attack discrimination in both its overt and more subtle forms. The disparate impact model is an invaluable tool in the eradication of discrimination in its more subtle form.

> Once these employment practices with differential impact have been brought into the open, *no sound policy reason exists for refusing to apply traditional disparate impact analysis to them*. Indeed, application of disparate impact in this situation speeds the day when we will

> have rid ourselves of discrimination in its subtle as well as its crass aspect.

Segar v. Smith, 738 F.2d 1249, 1271 n.18 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985) (emphasis added). Although the early years of Title VII were characterized by cases of blatant, overt and intentional discrimination,[28] recent cases more often involve inadvertent or more subtle forms of discrimination. "The overt and blatant bigotry that marked the leading civil rights cases of an earlier year seldom supplies the gravaman of cases which now reach the appellate courts." *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1013 (D.C. Cir. 1981). In short, racism and other forms of discrimination have gone underground. As is the case with any law, people have found a way to circumvent Title VII, masking racism and the like in the form of employment criteria, objective and subjective. Not allowing the application of the disparate impact model to both objective and subjective practices would thwart the purpose behind Title VII, and allow subtle discrimination to go unchecked. This was not the purpose behind Title VII and should not be supported by this Court.

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[28] "It was the more conspicuous forms of intentional discrimination that animated the legislative initiative in 1964, and in the first decade after Title VII's enactment occupied the energy and time of the courts and of the EEOC." Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 U.C.L.A. L.REV. 305, 310 (1983).

III. THE MAJORITY OF CIRCUIT COURTS APPLY DISPARATE IMPACT ANALYSIS TO SUBJECTIVE EMPLOYMENT CRITERIA

The Second, Third, Sixth, Ninth, Tenth, Eleventh and District of Columbia Circuits apply disparate impact analysis to subjective practices and criteria.[29] The Fourth, Seventh and Eighth Circuits have reached conflicting results.[30] The

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[29] *See e.g., Zahorik v. Cornell University*, 729 F.2d 85 (2d Cir. 1984); *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); *Wilmore v. City of Wilmington*, 699 F.2d 667 (3d Cir. 1983); *Rowe v. Cleveland Pneumatic Co., Numerical Control Inc.*, 690 F.2d 88 (6th Cir. 1982); *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987); *Hawkins v. Bounds*, 752 F.2d 500 (10th Cir. 1985); *Coe v. Yellow Freight Systems, Inc.*, 646 F.2d 444 (10th Cir. 1981); *Griffin v. Carlin*, 775 F.2d 1516 (11th Cir. 1985); *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

[30] *EEOC v. Federal Reserve Bank*, 698 F.2d 633 (4th Cir. 1983), *rev'd on other grounds sub. nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984) (stating that disparate impact analysis could only be applied to objective practices); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed pursuant to Sup.Ct.R. 60*, 404 U.S. 1006 (1971) (applying disparate impact analysis to use of a seniority system that was at least partially subjective); *Griffin v. Board of Regents*, 795 F.2d 1281 (7th Cir. 1986) (refusing to apply disparate impact analysis) *contra Clark v. Chrysler Corp.*, 673

(Footnote Continued)

Fifth Circuit, from which this case originates, has also reached conflicting results. In earlier cases, the court, relying on *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972), applied disparate impact analysis to subjective criteria. In more recent cases, however, the court has relied on *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982), in refusing to apply disparate impact analysis to subjective criteria. Recently, the Fifth Circuit did apply the theory to subjective practices, in accord with *Rowe*. In *Page v. U.S. Industries, Inc.*, 726 F.2d 1038 (5th Cir. 1984), the court applied disparate impact analysis because "promotional systems which depend upon the subjective evaluation and favorable recommendation of immediate supervisors provide a ready vehicle for discrimination." *Id.*, at 1054.

The majority of courts apply disparate impact analysis to subjective criteria. The remaining courts have all applied it at one time, but now have reached conflicting results. Not one circuit court has consistently refused to apply disparate impact analysis to subjective criteria.

A. The use of subjective employment criteria is viewed suspiciously by courts as a convenient pretext for discrimination, and thus warrants the application of disparate impact analysis.

(Footnote Continued)
F.2d 921 (7th Cir.) *cert. denied*, 459 U.S. 873 (1982); *Talley v. United States Postal Service*, 720 F.2d 505 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984) (refusing to apply disparate impact analysis) *contra Gilbert v. Little Rock*, 722 F.2d 1390 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984).

Most circuit courts view the use of subjective criteria by employers suspiciously, as a ready mechanism for discrimination.[31] "We have repeatedly held that subjective practices such as interviews and supervisory recommendations are capable of operating as barriers to minority advancement." *Griffin v. Carlin, supra* at 1525. Of particular concern to the courts are cases in which the subjective evaluations are made of minority employees by white supervisors. "This Court and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action." *Crawford v. Western Electric Co., supra*, at 1316. Such concern illustrates the fear that many courts have when they consider the ease with which employers can mask racial bias with subjective employment practices.

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[31] *Atonio v. Wards Packing Co., Inc., supra*, at 1484 (9th Cir. 1987); *Griffin v. Carlin, supra* at 1525 (11th Cir. 1985); *Williams v. Colorado Springs, Colo. Sch. Dist.*, 641 F.2d 835, 842 (10th Cir. 1981); *Crawford v. Western Electric Co.*, 614 F.2d 1300, 1315 (5th Cir. 1980); *Grant v. Bethleham Steel Corp.*, 635 F.2d 1007, 1016 (2d Cir. 1980); *Davis v. Califano*, 613 F.2d 957, 965-966 (D.C. Cir. 1979); *Abrams v. Johnson*, 534 F.2d 1226 (6th Cir. 1976); *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 550 (4th Cir. 1975); *Muller v. U.S. Steel Corp.*, 509 F.2d 923, 928 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.), *vacated* 423 U.S. 809 (1975); *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).

Considering that subjective employment practices are inherently suspect, the use of the disparate treatment analysis to examine them is clearly appropriate. The majority of the circuit courts agree, and in fact apply impact analysis to cases involving purely discretionary and subjective decision-making by employers and their supervisors.[32] Under the disparate treatment model, an employer would merely be required to *articulate* a legitimate, nondiscriminatory reason for the adverse impact of the subjective employment practice. Under the disparate impact model, however, an employer would have to *justify* his or her use of subjective criteria as a business necessity. Disparate impact is therefore a more stringent examination of an employer's practices and is appropriate when these practices are inherently suspect, as subjective criteria are.

IV. BUSINESS NECESSITY IS NOT AN ONEROUS BURDEN FOR EMPLOYERS.

The Supreme Court first articulated the business necessity defense in *Griggs v. Duke Power Company, supra*. In that case, this Court used "business necessity" and "job-relatedness" interchangeably, and defined the burden as a "showing that any given requirement must have a manifest relationship to the employment in question." *Griggs, supra* at 432. In *Albemarle Paper Co. v. Moody*, this Court said that an employer has a legitimate interest in "efficient and trustworthy workmanship," 422 U.S. 405 at 425, thereby suggesting that an employment practice, to

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[32] *Supra*, note 11.

be justified, must be related to that interest. In *Dothard v. Rawlinson*, the Court stated that "a discriminatory employment practice must be shown to be necessary to the safe and efficient job performance to survive a title VII challenge." 433 U.S. 321 at 331 & n.14 (1977). Circuit courts and legal commentators have further clarified the scope of business necessity.

As the Ninth Circuit has held, "precisely what the employer must prove will vary with the factors of different job settings." *Atonio, supra* at 1486. Two prominent legal scholars in employment law have said that "business necessity" and "job-relatedness" are not interchangeable terms. "Job-relatedness is one, but not the exclusive, means of establishing business necessity."[33] The circuit court decisions support such a distinction. Job-relatedness is but one of the two standards which have emerged from the circuit court decisions as ways to prove business necessity. The second standard is one of safety and efficiency. "As it has worked out in the lower courts, the job-relatedness language is usually applied to testing and academic requirements, while the safety and efficiency language is generally applied to other employment practices." *Williams v. Colorado Springs, Colo. Sch. Dist., supra*, at 841, n.2.

Basically, an employer should have to prove that his or her use of subjective employment criteria is a business necessity. "The term 'necessity' connotes that the exclusionary practice must be shown to be of great importance to job performance..." *Id.* Additionally, an employer should have to prove that the characteristics for

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[33] Schlei and Grossman, EMPLOYMENT DISCRIMINATION LAW (2nd Ed. 1983) at 114.

which he or she subjectively evaluates the applicants are related to the effective operation of the business. Finally, "there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser discriminatory racial impact." *Id.*, quoting *Robinson v. Lorillard Corp., supra* at 798. In order to satisfy this final part of the business necessity showing, employers would merely have to show that other practices, such as more objective criteria, would not serve their business purpose as well as their present criteria.

There have been and will be cases in which subjective criteria survive a disparate impact challenge. One such case involved the process by which tenure decisions were made by a university. In *Zahorik v. Cornell University, supra*, although the plaintiff failed to prove disparate impact, the court discussed the business necessity of using a highly subjective process. It said that even though the process by which tenure decisions were made was very subjective, the process was job-related. 729 F.2d 85 at 96. Many jobs, especially white collar, professional and supervisory jobs, often require at least some degree of subjective evaluation. When such criteria is challenged for disparate impact, an employer should have to show: (1) that the effective operation of the business requires subjective criteria; (2) that the characteristics for which the applicants are subjectively evaluated are related to the business purpose; (3) and that the business could not be as effectively operated with the use of different criteria which have a less discriminatory impact.

A showing of business necessity is not an onerous burden for employers to bear for a number of reasons. First and foremost is the fact that an employer does not have to show business necessity until after a plaintiff has established that the

employment practices of the employer have a discriminatory impact. "This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, ..*e*. has shown that the [practices] in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle, supra* at 425. The employer's burden vests only after the plaintiff has met her burden of at least equal weight. As the Ninth Circuit recently pointed out:

> The burden of proof on the employer is commensurate with the greater burden on the plaintiff to prove impact and to establish the causal connection between the practices and the impact. Once a challenged practice which causes disparate impact is identified, it does not place an unfair burden to ask an employer to justify the challenged practice.[34]

Business necessity, therefore, is not an onerous burden for an employer to bear in light of the substantially equal burden that rests with the plaintiff in an adverse impact case.

Moreover, once a plaintiff has met her burden in an adverse impact case, such a strong showing of discrimination cries out for an equally strong justification. "The hard, cold statistical record of impact provides a stronger circumstantial case of discrimination than a subjective claim of improper motivation." *Grant v. Bethlehem Steel Corp., supra* at 1015. To force an employer to justify the use of an employment practice once that practice

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[34] *Atonio v. Wards Cove Packing Co., Inc., supra,* at 1486. *See also Segar v. Smith, supra,* at 1271.

has been shown to have a statistically disparate impact does not impose too heavy a burden.

A showing of business necessity by the employer is not too onerous a burden considering that the employer is in the best position to make such a showing.

> The employer will possess knowledge far superior to that of the plaintiff as to precisely how its employment practices affect employees. This fact, as the Fifth Circuit noted in *Pouncy*,[35] 668 F.2d at 801, traditionally justifies placing on the defendant the burden of proving business necessity of an employment practice.[36]

The Ninth Circuit has said that in its view, proving business necessity is not more onerous in cases involving subjective criteria, simply because the employer has the superior knowledge of "what his practices are and why he uses the methods and criteria he does, ... [and] precisely how his employment practices affect employees." *Atonio, supra*, at 1486. Asking an employer to open up his or her practices, to explain and to justify them after they have been shown to have a discriminatory effect, does not impose an unreasonable burden.

CONCLUSION

The clear purpose behind Title VII was to end discrimination in whatever form it might take.

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[35] *Pouncy v. Prudential Insurance Company of America, supra.*

[36] *Segar v. Smith, supra.* at 1271.

Disparate impact analysis is an effective and essential tool available to courts in examining an employer's practices. To immunize subjective employment practices from the exacting scrutiny of disparate impact analysis would be to subvert the explicit purpose behind the enactment of Title VII. Adverse impact analysis should be available to challenge any employment criteria that have been shown to have a discriminatory impact. Only in this way can our society ever hope to overcome the legacy of social, political and economic subjugation suffered by women and minorities which has in the past, frustrated, and continues today to frustrate, their attempts to compete with others on an equal basis.

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I hereby certify that three true and correct copies of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested, as of the 14th day of September, 1987 to the following counsel of record at the addresses indicated:

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